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In the Supreme Court of the United States

OCTOBER TERM, 1963

JIM GARRISON,

Appellant,

v.

STATE OF LOUISIANA,

Appellee.

On Appeal from the Supreme Court of Louisiana

SUPPLEMENTAL BRIEF FOR APPELLEE

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana,
2201 State Capitol,
Baton Rouge, Louisiana.

M. E. CULLIGAN,
Assistant Attorney General,
State of Louisiana,
104 Supreme Court Bldg.,
301 Loyola Avenue,
New Orleans, Louisiana.

JOHN E. JACKSON, JR.,
Assistant Attorney General,
State of Louisiana,
104 Supreme Court Bldg.,
301 Loyola Avenue,
New Orleans, Louisiana.

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In *New York Times Company, et al. v. Sullivan*, Numbers 39 and 40 of the October Term, 1963, decided March 9, 1964, this court held that a public official is prohibited from recovering damages "for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

This case (hereinafter referred to as "the Sullivan case") also holds that there is no absolute privilege for the criticism of public officials; that while the First and Fourteenth Amendments require such criticism to be privileged, the privilege is qualified to this extent: Any official claiming to be defamed by

the communication has a remedy if he can prove actual malice.

The Sullivan case further holds that neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, but that actual malice does.

The Sullivan case further holds that the proof presented to show actual malice on the part of the defendants could not constitutionally sustain the judgment against them. The individual defendants had denied that they had authorized the use of their names on the advertisement in question, and "there was *no evidence whatever* that they were aware of any erroneous statements or were in any way reckless in that regard." The court further held that the record tended to show that the facts alleged in the advertisement *were substantially correct* and that the opinion of the representative of the New York Times that the facts were substantially correct when he authorized publication was a reasonable one and "there was no evidence to impeach the witness' good faith in holding it." The court further held that the record failed to show that the guilty knowledge required for actual malice had been brought home to the persons in the Times organization having responsibility for the publication of the advertisement.

This court, in the Sullivan case, further held that the evidence presented was constitutionally defective in another respect: "It was incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning respondent . . .

there was no reference to respondent in the advertisement either by name or official position . . . this reliance on the bare fact of respondent's official position" would transmute "criticism of government however impersonal it may seem on its face into personal criticism, and hence potential libel, of the officials of whom the government is composed . . . we hold that such a proposition may not constitutionally be utilized to establish that *an otherwise impersonal attack on governmental operations* was a libel of an official responsible for those operations." (Emphasis supplied.)

In the trial of the Sullivan case, the Alabama state trial judge had submitted the case to the jury under the instructions that the statements in the advertisement were libelous per se and were *not privileged*. The jury was instructed that because the statements were libelous per se, injury, falsity, and malice are presumed. The Supreme Court of Alabama sustained the trial judge's rulings in all respects. In reversing the Alabama decision, this court held that the rule of law applied by the Alabama courts is constitutionally deficient *because malice was presumed*. Under Alabama law, the defendant had no defense other than to prove that all of the statements were true in all their particulars, *his privilege of fair comment depending upon the proof of truth*. His good motives and a belief in the truth did not negate the presumption of malice under Alabama law. The United States Supreme Court was thus presented with the question of whether criticism of official conduct forfeits its constitutional protection because of the falsity of some of

its factual statements and because of its alleged defamation of the official criticized.

As pointed out above, this court held that the defense of truth did not allow a sufficient safeguard under the constitution for criticism of official conduct; that such criticism was constitutionally privileged, and that actual malice must be proved in order to destroy the privilege.

In its opinion, the court points out that this is not a new rule of law and quotes with approval from a 1908 Kansas case which sets forth the identical rule. This court further points out in its opinion that this ruling has already been adopted by a number of state courts.

The Louisiana Criminal Defamation Statute is in complete accord with the rationale of the Sullivan case. R.S. 14:49 provides in part as follows:

> "A qualified privilege exists and actual malice must be proved regardless of whether the publication is true or false in the following situations:
>
> . . .
>
> (2) Where the publication or expression is a comment made in the reasonable belief of its truth, upon,
>
> (a) The conduct of a person in respect to public affairs. . . ."

Under the Criminal Defamation Statute of Louisiana, as the above excerpt from R.S. 14:49 shows, a qualified privilege exists for criticism of public officials, and actual malice must be proved in order to

convict *regardless of whether the publication is true or false.* The Louisiana Criminal Defamation Statute allows the "defense for erroneous statements honestly made" which the Sullivan case held to be essential to constitutionality. See *Louisiana v. Webster*, 159 So. 2d 140, discussed on pages 27-28 of appellee's original brief herein.[1]

While the Louisiana Defamation Statute is entirely in accord with the rationale of the Sullivan case, the facts of the instant case are distinguishable from the facts of the Sullivan case in two important respects.

First, the advertisement in the Sullivan case made no attack of a personal character upon any individual. It did not refer to the respondent, either by name or official position. Respondent's witnesses did not suggest any basis for the belief that respondent himself was attacked in the advertisement beyond the bare fact that he was in charge of the police department and thus bore official responsibility for police conduct, and beyond the unsupported assumption that because of his official position, he must have been responsible. It was conceded by respondent that the alleged defamatory advertisement related solely to his official conduct, and did not charge him personally with anything. (See Footnote 23 of majority opinion.)

In the case at bar the appellant's statement that every one of the eight Criminal Court judges was in-

[1]The Sedition Act of 1798 did not provide a privilege for criticism of official conduct and allowed only truth as a defense. For this reason, this court's opinion as to its constitutionality has no application to the case at bar.

fluenced by racketeers related to the private conduct and private reputations of the persons defamed, and charged them personally.

Although some of the appellant's statement related to the official conduct of the defamed individuals, the accusation of racketeer influence went beyond criticism of official conduct and attacked the worth of the persons who were judges as individuals and attacked their personal reputations. The majority opinion in the Sullivan case recognizes that the privilege of criticism of official conduct does not extend to personal attacks imputing moral turpitude. The concurring opinion of Mr. Justice Goldberg also recognizes this principle when it states that "this is not to say that the constitution protects defamatory statements directed against the private conduct of a public official or private citizen . . . purely private defamation has little to do with the political ends of a self governing society . . . in most cases, as in the case at bar, there will be little difficulty in distinguishing defamatory speech relating to private conduct from that related to official conduct. I recognize, of course, that there will be a gray area."

Edward Livingston's comment, quoted on page 19 of appellee's original brief is apropos. As stated by Livingston, defendant in the case at bar made "animadversions on public proceedings . . . the vehicle for injury to private character."

In his supplemental brief, page 6, appellant claims that his "vocal efforts" were "directed toward

bringing to public attention, the crowded condition of the court's criminal docket, attributed by appellant to the Judges' neglect of duty and excessive vacations." In reality appellant used such vocal efforts as a subterfuge for a vengeful attack on the private character of the judges with whom he was feuding, when he added to such "vocal efforts" his accusation of racketeer influence.

Second, the Sullivan case is to be distinguished from the case at bar in that there was absolutely no proof of actual malice in the record in the Sullivan case. The opinion in the Sullivan case equates actual malice with "knowledge that the statement was false or with reckless disregard of whether it was false or not."[1]

In the case at bar the record substantiates the Louisiana courts' finding of actual malice.

An examination of the record demonstrates that this appellant became provoked because the judges had the audacity to disagree with him as to the necessity for accounting for certain expenditures from the Fine and Forfeitures Fund either from a legal or a policy standpoint. He made no attempt to handle this controversy through the channels provided by law but decided to seek revenge by attacking the character of these individuals. His first public attack on the personal character of the judges was made on November 2,

[1]It is interesting to note that in his application for rehearing before the Louisiana Supreme Court, appellant argued that it was "indefensible" to treat knowledge of falsity or a reckless disregard of whether it was false or not as equivalent to actual malice. (R 185)

1962 in response to a statement made by retired judge, William J. O'Hara, in which attack appellant included all eight individuals, going into their motivation as being influenced by racketeers.

With the knowledge that his statement was false, or with a reckless disregard as to whether it was false or not, appellant made the statement that racketeer influences on every one of the eight Criminal Court judges caused them to block his vice investigations by cutting off funds from the Fines and Forfeitures Fund. Appellant knew what he said was a falsehood but he deliberately set out to injure the reputations of every one of the eight individuals who were Criminal Court judges because he was frustrated by the five-out-of-eight rule and was provoked by feelings of ill will toward certain individual members of the Criminal Court bench.

The record demonstrates appellant's guilty knowledge of the falsity of his statement, his feelings of ill will, and his wanton desire to injure the victims of his hate campaign, all of which support the finding of actual malice, as follows:

In his successful campaign for District Attorney, appellant had criticized the system of accounting used by the previous district attorney for expenditures from the Fines and Forfeiture Fund, (hereinafter called "the fund") and he knew that the system used in the previous administration, which he had defeated, was not going to continue. R. 424-426.

On August 20, 1962, appellant knew that the

judges were desirous of changing the old system and setting up a better system of accounting by his office for expenditures from the fund. R. 233. Appellant himself stated, "The judges want to set up a system, and I think they are right." R. 233.

On September 10, 1962, Judge Wimberly approved an expenditure from the fund for a rug upon appellant's false representation to him that retired Judge O'Hara had not previously refused to approve the expenditure but had merely forgotten to approve it before leaving town on vacation. As a matter of fact, Judge O'Hara had refused to approve the expenditure because no proof of its value was furnished and appellant never provided the proof required by Judge O'Hara. R. 317-318; R. 349-350.

Prior to October, 1962, expenditures from the fund for vice investigations by appellant's office had been approved by individual judges; R. 478, 481, 482, 483, 510, and 515.

After the misstatement by appellant to Judge Wimberly about retired Judge O'Hara's approval, the judges decided to require a more stringent form of accounting for expenditures from the fund. Retired Judge O'Hara told appellant why certain of his expenditures had not been approved; that he considered certain of his expenditures extravagant and that there was insufficient proof as to their value. R. 316-317. However, appellant did not say anything to retired Judge O'Hara about his vice investigations or the operations of his office being hampered by the failure

to approve his expenditures. This is what Judge O'Hara testified:

> "When Mr. Garrison came into my office to ask me if I wouldn't please change my attitude toward the carpets, he did not say anything to me about his operations being hampered. I didn't hear a word from the District Attorney's office at that time and I didn't hear anything until later that they were using the money and later than that Mr. Garrison attempted to juxtapose two things that had no connection whatsoever. One of those things was the deferment of my approval and the other thing was vice. There was no connection between those things whatsoever. It came a long time later and the statement that there was such a connection is an absolute falsity." R. 333

On October 4, 1962, the eight Criminal Court judges, in an en banc meeting, adopted the rule that five of the eight judges would be required to approve an expenditure from the fund. R. 416, 488. The reason that the judges had for disapproving appellant's expenditures from the fund was that he had furnished them with no supporting proof to show where the money had gone and that they considered certain of the expenditures improper. The judges did not limit their disapproval of appellant's expenditures to those for vice expenditures, for certain expenditures relating to matters other than undercover work for vice investigations were disapproved for lack of proper accounting. The reason for the five man rule was to require a better system of accounting for expenditures from the fund and to prevent the playing off of one judge against the other, as in the instance of appel-

lant's misrepresentation to Judge Wimberly about Judge O'Hara's approval of the rug expenditure. *Appellant was present at the en banc meeting and was informed of the reason for the adoption of the five man rule.* R. 351-353, 391, 416-419, 422, 488, 492, 506, 511, 512, 513-514. At the en banc meeting appellant contended that he had absolute discretion to use the fund in any manner that he saw fit. R. 376. He argued that he felt that the judges had no discretion as to his expenditures from the fund, but later, at the meeting, he conceded that they did have discretion to approve or disapprove his expenditures. R. 517-518, 522. At the same en banc meeting there was some unpleasantness between the appellant and Judge Cocke. R. 518. When Judge Cocke asked appellant for proof that he had borrowed money to pay for expenditures which had not yet been approved, appellant replied that Judge Cocke should consult a psychiatrist. R. 530.

Judge Brahney testified that he did not approve of expenditures totaling $859.00 for undercover work because appellant's office never gave him an account as to when, where, and how the money was spent, although he requested the information from appellant on *three different occasions.* R. 514-516.

On the morning of November 2, 1962, defendant made the statement to the New Orleans Press which is subject of this proceeding, accusing the judges of cutting off his operating funds in order to block his vice investigations because they were influenced by racketeers.

Later, on the same day, November 2, 1962, appellant, in a television interview, stated to Bill Reed of W.W.L.T.V. that a statement made by the judges was a lie. R. 277. In the same interview, he also stated it would have been a waste of time to meet with the judges to discuss their differences and that:

> "The only way to get these sacred cows back to work is by public reaction."[1]

He also stated in the same interview that the judges should be investigated for taking 206 days of vacation; that it was outrageous for them to receive a salary of $18,000.00 per year and that the only way to refer to it was as a "racket." R. 277-278.

About November the 10th, 1962, appellant upon being questioned by the press as to his being charged with public defamation replied that "someone is trying to get me out of office." R. 281.

Between May 7, 1962 and September 10, 1962, the individual judges had approved 73 motions of appellant for expenditures from the fund, totaling $19,284.56. On October 26, 1962, the five man rule as to expenditures was in effect and the judges, en banc, approved 80 items of expenditures from the fund totaling $10,276.00. Between October 26, 1962 and the date of appellant's trial in January, 1963, the judges, en banc, approved 32 motions of expenditures from the fund totaling $17,742.00, or a grand total, from the date appellant took office in May of 1962, of $47,-

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[1] A "sacred cow", according to Webster's (Second) International Dictionary, unabridged, is: "A person or thing regarded as sacrosanct and immune from violation, attack, criticism, or the like." Jocose.

303.23. R. 376, 384, 385, 515. In addition to the expenditures which had been authorized, appellant had 12 policemen, of his own choice, who were paid by the City of New Orleans but were assigned to his office to be used by him in his investigations. R. 555-556. Appellant made no request for any additional policemen. R. 560. In view of the large amount of expenditures approved by the judges, and in view of the assistanee he was receiving from the police assigned to him, appellant knew that the operations of his office had not been blocked merely because more stringent accounting requirements had been set by the judges.

On November 9, 1962, appellant stated to a Times-Picayune reporter that he had threatened to take racketeering influences of the judges to the Grand Jury. R. 217-218. He told the same thing to a New Orleans States-Item reporter. R. 236, 238. When the reporter asked him what he meant by "racketeering influences", he replied:

> "that he didn't mean that the judges themselves were tied up with racketeers or that the racketeers influenced them in their conduct of their office, but rather that—using the example of a person who might be a friend of a Deputy Sheriff, who might be a friend of a court attache, who then might get a favor from the Court, and that he could be explained as racketeering influence, although it is very indirect and very far afield."

R. 238. (This explanation by itself shows that appellant had a reckless disregard as to the truth or falsity of his accusation that the judges blocked his vice in-

vestigations because they were influenced by racketeers.)

The same States-Item reporter testified that there was a running fight or a "pretty good fight going" between appellant and the defamed judges and that he had sat in appellant's office and had heard him "blast" the judges. R. 244.

On December 5, 1962, in a speech before the congregation of St. Anthony's Catholic Church, appellant told the audience that the judges had sent messages to him that he would get no more money when he began closing joints for B-drinking operations. He said that the judges stopped his vice investigations. He repeated his charge of racketeer influences on the judges. He stated that no other question could arise but racketeer influences when the judges cut off his funds. He stated that the judges tried to prevent him from doing his duty. He stated that the judges never questioned his expenditures until the first B-drinking joint began to cave in and that the reason for questioning his expenditures was that he was fighting vice. He repeated that it was true that questions of influence were used. He stated:

> "This concern by the judges of the expenditures had never before been questioned in the slightest degree until the first B-drinking joint began to cave in. *I don't care what reasons they give* . . . it is true that questions of influence were used . . . I have no allies because the other officials are the association of armed robbers . . . *I don't care* how much these people try to conceal the

> facts with half-truths and downright lies . . . *I don't care* if the judges wear black robes or purple robes or a crown . . . I will not let any judge block me in any way." R. 252-259.

(The court's attention is called to the appellant's frequent use of the words "I don't care". This speech convicts appellant of a reckless disregard of whether his statement of racketeer influence was false or not.)

On December 4, 1962, appellant told a States-Item reporter that he had been irritated by a letter that he had received from the judges concerning his expenditures and criticizing the way that he had handed out money from the fund. R. 264. He also told this same reporter that in October, 1962, the judges had told him that they would not approve expenditures from the fund to reimburse him for his bank loan, and that when it became apparent he was not going to get his money, he decided to carry it to the public. R. 266.

On January 12, 1963, at a talk before a luncheon club at the Monteleone Hotel, which was reported in the New Orleans press, appellant said that there were some good judges in the Criminal District Court and singled out, as a "good judge", Judge Shirley Wimberly, one of the judges whom he had defamed in November. R. 271. He further stated in the luncheon speech that the judges were under the leadership of the "incredible Judge Bernard Cocke". R. 271.

Later, on the same day, January 12, 1963, at a Press Club meeting before 150 to 200 people, appellant repeated the charge that all eight of the Criminal

Court judges were influenced by racketeers and that this was the reason that they had cut off his operating funds at a crucial moment in his French Quarter investigation. R. 248. At the same meeting appellant predicted that he would be convicted of defamation by the Lower Court but that his conviction would be reversed by the highest court in the land. R. 249.

After making the statement of November 2nd, 1962, which is the subject of this proceeding, appellant told Judge Schulingkamp, one of the defamed individuals, that he did not then, nor did he ever think or believe, that Judge Schulingkamp was under the influence of racketeers. R. 383.

On January 19, 1963, appellant stated in a television interview that if he had it to do over again, he would make the same statement. R. 220.

None of the above evidence was rebutted by appellant. He introduced absolutely no evidence. All of the above evidence stands uncontradicted, although prior to the trial, in answer to appellant's motion for a bill of particulars, the state informed appellant that it would prove not only implied malice but also actual malice.

In his supplemental brief appellant has argued that a criminal libel prosecution requires greater safeguards for constitutional validity than a civil libel action; he suggests that in a criminal libel prosecution, this court should add "proof of clear-and-present-danger" to the Sullivan case's requirement of actual malice.

Appellant's argument is illogical for, as this court stated, in the Sullivan case, "The test is not the form in which state power has been applied, but, whatever the form, whether such power has in fact been exercised."

Therefore, whether state power to limit speech is exercised in the form of a civil libel action and the awarding of civil damages, or in the form of a criminal prosecution and the imposition of a fine, as in the case at bar, the constitutional principles to be applied are the same. The privileges of fair comment, subject only to proof of actual malice, affords the same safeguard required by the First and Fourteenth Amendments in both criminal and civil libel actions.

Furthermore, appellant's argument that criminal libel requires greater safeguards for constitutional application than civil libel is refuted by this court's language in the Sullivan case, as follows:

> "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. See *City of Chicago v. Tribune Co.*, 307 Ill. 596, 607, 139 N.E. 86, 90 (1923). Alabama, for example, has a criminal libel law which subjects to prosecution 'any person who speaks, writes, or prints of and concerning another any accusation falsely and

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[11] Cf. *Farmers Union v. WDAY*, 360 U.S. 525, 535.

maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude,' and which allows as punishment upon conviction a fine not exceeding $500 and a prison sentence of six months. Alabama Code, Tit. 14, § 350. *Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication.*" Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is 'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.' *Bantam Books,*

" 'The Times states that four other libel suits based on the advertisement have been filed against it by others who have served as Montgomery City Commissioners and by the Governor of Alabama; that another $500,000 verdict has been awarded in the only one of these cases that has yet gone to trial; and that the damages sought in the other three total $2,000,000."

Inc. v. Sullivan, 372 U.S. 58, 70." (Emphasis supplied.)

CONCLUSION

The Louisiana Defamation Statute is in complete accord with the rationale of *New York Times v. Sullivan* in that it allows a defense for erroneous statements honestly made about public officials, and it provides a qualified privilege for criticism of official conduct which can only be destroyed by proof of actual malice. The Louisiana Defamation Statute, therefore, meets the test of constitutionality set forth by this court in the Sullivan case.

Appellant's statement that the eight Criminal Court judges were each influenced by racketeers went beyond criticism of official conduct, was an attack on the personal character of each judge, and constituted private defamation, which is not protected by the constitutional privilege set forth in the Sullivan case.

However, even if appellant's accusation were considered to be a criticism of official conduct and thus privileged, the privilege was destroyed by proof of appellant's actual malice.

The evidence, as shown by the record, constitutionally sustains the Louisiana court's finding of actual malice. Although the State of Louisiana negatived by affirmative proof every possible defense which appellant had, appellant offered no evidence whatever.

The state proved beyond a reasonable doubt that appellant made the accusation of "racketeer influence" knowing that it was false or with a reckless disregard to whether it was false or not, and this evidence stands uncontradicted.

In view of the foregoing, it is respectfully submitted that this appeal should be dismissed or in the alternative that the judgment of the State Court should be affirmed.

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana,
2201 State Capitol,
Baton Rouge, Louisiana.

M. E. CULLIGAN,
Assistant Attorney General,
State of Louisiana,
104 Supreme Court Bldg.,
301 Loyola Avenue,
New Orleans, Louisiana.

JOHN E. JACKSON, JR.,
Assistant Attorney General,
State of Louisiana,
104 Supreme Court Bldg.,
301 Loyola Avenue,
New Orleans, Louisiana.

CERTIFICATE

I, Michael E. Culligan, a member of the Bar of the United States Supreme Court, hereby certify that this_____day of_____, 1964, a copy of the above and foregoing brief was served on Eberhard P. Deutsch and Rene H. Himel, Jr., Hibernia Bank Building, New Orleans 12, Louisiana, and Louis P. Trent, 400 Perez Building, 419 Carondelet Street, New Orleans, Louisiana, by depositing same in the United States Mail, postage prepaid.

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Of Counsel.

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